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# MEMORANDUM BRIEF OF QUESTIONS THAT MAY ARISE IN CONNECTION WITH THE KANSAS CONSTITUTION AND TITLE I OF THE FEDERAL SOCIAL SECURITY ACT

By

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Section 4 of article 7 of the Kansas constitution provides that "the respective counties of the state shall provide, as may be prescribed by law, for those inhabitants, who, by reason of age, infirmity or other misfortune may have claims upon the sympathy and aid of society."

Section 4 of article 11 provides that "the legislature shall provide, at each regular session, for raising sufficient revenue to defray the current expenses of the state for two years."

The Federal Social Security Act [H.R. 7260] provides in section 2 "(a) that a state plan for old age assistance must (1) provide that it shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the state; ....."

Financial participation by the state must be provided in the state plan. However, state financial participation is not necessary before July 1, 1937, where the Board finds the state is so prevented by its constitution [H.R. 7260, Title I, Sec. 3a].

In view of the Kansas constitutional provisions quoted above, in what manner may the state provide financial assistance in meeting the federal requirements?

There are at least five states having constitutional provisions almost identical with that of section 4 of article 7 of the Kansas constitution. These states are Florida, Nevada, Montana, Oklahoma and South Carolina. Two other states, Alabama and Indiana, have somewhat similar provisions. The texts of these constitutional provisions are set forth below.

None of the plans of the states listed below, except Alabama, appear to have been approved by the Federal Social Security Board.

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STATE CONSTITUTIONAL PROVISIONS

Florida: Sec. 3 of art. 13 of the Florida constitution provides as follows:

"Section 3. The respective counties of the state shall provide in the manner prescribed by law for those of the inhabitants that, by reason of age, infirmity, or misfortune, may have claims upon the aid and sympathy of society."

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The Florida legislature in 1935 passed Senate Joint Resolution No. 170, which is found in Volume 1, page 1512 of the General Laws of Florida, 1935. This joint resolution proposes an amendment to the said section 3 quoted above, which proposed amendment reads as follows:

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"Section 3. The respective counties of the State shall provide in the manner prescribed by law, for those of the inhabitants who by reason of age, infirmity, or misfortune, may have claims upon the aid and sympathy of society; provided, however, the Legislature may by general law provide for a uniform State-wide system for such benefits, and appropriate money therefor; but no such general law shall provide benefits to any person who shall not have been a resident of the State of Florida for a period of five years continuously next preceeding his application therefor, nor shall such general law provide for benefits to any persons solely on account of age who has not attained the age of sixty-five years; Provided, further, that where by any law of the United States, a lessor or different period of residence age or citizenship shall be fixed in order for the State of Florida to participate in any Federal grants that might be made for such purposes, the legislature may prescribe such requirements as to citizenship, age and residence as will be consistent with and not in conflict with such Federal Law."

This proposed amendment will be voted upon in 1936.

Florida has an optional old age assistance law, the source of funds being the county: taxes and appropriations from general fund. Also state: confederate pension fund. (Laws, 1935, ch. 17141.)

Nevada: Sec. 3 of art. 13 of the Nevada constitution provides as follows:

"Section 3. The respective counties of the state shall provide as may be prescribed by law, for those inhabitants who, by reason of

age and infirmity, or misfortunes, may have claim upon the sympathy and aid of society."

Nevada has an optional old age assistance law with no state assistance, the source of the funds being the county general fund. (Nevada Compiled Laws, 1929, Sec's 5109 to 5136; Laws, 1935, ch. 138.)

Montana: Sec. 5 of art. 10 of the Montana constitution provides as follows:

"Sec. 5. The several counties of the state shall provide as may be prescribed by law for those inhabitants, who, by reason of age, infirmity or misfortune, may have claims upon the sympathy and aid of society."

Montana has a mandatory old age assistance law, the source of funds being the county poor fund (tax levies). Also the state reimburses counties up to 75 per cent from state old age assistance fund (tax levies and federal grants). H.B. 195, 343 (1935). L. 1935, ch. 170.

South Carolina: Sec. 3 of art. 12 of the South Carolina constitution provides as follows:

"Section 3. The respective counties of this State shall make such provision as may be determined by law for all those inhabitants who by reason of age, infirmities and misfortune may have a claim upon the sympathy and aid of society."

Alabama: Sec. 88 of art. 4 of the Alabama constitution provides as follows:

"Section 88. It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."

Alabama has a mandatory old age assistance law, the source of revenue being the county, 50 per cent (General Fund). Also state (50 per cent, 1/3 of 1 mill tax levied for confederate pension, additional appropriation). Laws, 1935, S.B. 397, L. 1935, Act No. 448, P. 967.

Indiana: Sec. 3 of art. 9 of the Indiana constitution provides as follows:

"Section 3. The county boards shall have power to provide farms as an asylum for those persons who, by reason of age, infirmity or other misfortune, have claims upon the sympathies and aid of society."

Indiana has a mandatory old age assistance law, the source of funds

being the county (50 per cent, general fund). Also the state (50 per cent general fund). Laws, 1933, ch. 36.

Oklahoma: Sec. 3 of article 17 of the Oklahoma constitution provides as follows:

"Section 3. The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county."

An amendment to the Oklahoma constitution was held invalid because the election was called before the sufficiency of initiative petitions was determined.

CONSTITUTIONAL QUESTIONS INVOLVED

Some Kansas decisions:

In Griffith v. Osawkee Township, 14 K. 418, the court held an act authorizing townships to issue bonds for relief purposes void for the reason that it was giving relief to persons not entitled to relief. The court saying, citing article 7, section 4 of the Kansas Constitution, that the word "poor" includes only "paupers". The court, however, refused to base its decision upon the rule of law, "expressio unius, exclusio alterius," which is the implication arising from the fact that in as much as the constitution casts upon the respective counties the care of the destitute, it is an implied prohibition upon casting it elsewhere.

The court seems to have qualified the decision in the Osawkee case by holding in case of Beck v. Shawnee County, 105 K. 325, that the law providing for the establishment of a county settlement of public welfare institutions in certain counties was constitutional. The court saying that the powers conferred on the board of county commissioners are to be exercised independently of its powers relating to "paupers" and the county poor farm.

In Treadwell v. Beebe, 107 K. 31, the power of a city to accept a bequest of trust funds for public charitable use under a will was upheld. The court saying that "while the county is mainly the basic unit for the cost of local, charitable relief, yet the mayors and councils of the several cities are the overseers of the poor within

their municipalities." The court in discussing the Osawkee case, supra, stated that "what the Osawkee bond issue did not contemplate--food for the hungry, fuel for those suffering from cold--is precisely what this trust to the city of Anthony does contemplate."

As stated in Treadwell v. Beebe, supra, the county is the basic unit for the cost of local and charitable relief. The duty of the county to provide for unfortunate inhabitants was stated in the case of Rishel v. McPherson County, 122 K. 741, where it was held that the county may take and hold property as trustee for charitable uses and may administer the trusts.

In a case involving the statutory power of a county to construct an asylum for the insane the court held that there was no statutory authority, but stated: "This section [Art. 7, § 4] of the constitution is just as broad and all-inclusive as the one relied on by plaintiffs [Art. 7, § 1], and the fair construction of both of them is that it is the duty of the state and also of the several counties to make suitable provision for the care of the insane, subject to such regulations 'as may be prescribed by law.' (Art. 7, §§ 1, 4.) These constitutional provisions, which are manifestly not self-executing (State, ex rel., v. Deck, 106 Kan. 518, 188 Pac. 238), virtually give the legislature a free hand to impose the cost of care and maintenance of mentally infirm persons upon the state or the counties or on both according to the lawmakers' notions of wisdom and expediency. (Donnelly v. Atchison County Comm'rs, 130 K. 428, 429.)

THE DOCTRINE OF IMPLICATIONS

The implications arising from provisions of a constitution sometimes have a large influence upon its construction. It has been stated by Cooley on Constitutional Limitations, 8th Ed. (Vol. 1, P. 138) that under every constitution a doctrine of implication must be resorted to, in order to carry out the general grants of power. The application of this rule, however, must be necessary and not merely conjectural.

The Supreme Court of Nevada in construing the constitutional provision identical with article 7, section 4 of the Kansas Constitution, held that the state was without power to construct a state

asylum for the poor. State of Nevada v. Hallock, 14 Nev. 202, 205.

The Nevada court in construing the constitution stated: "It is true that the constitution does not expressly inhibit the power which the legislature has assumed to exercise, but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state constitution implies the negation of any power in the legislature to establish a different policy."

However, the Kansas court in holding that the Legislature may enact valid legislation making the estates of insane persons liable for the cost of maintenance at a state hospital, said:

"The state constitution provides that 'institutions for the benefit of the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law.' (Art. 7, § 1.) The defendant insists that this provision affixes to a state hospital for the insane the character of a benevolent institution, and that the exaction of payment from the persons there cared for is inconsistent with the idea of benevolence; and, also, that the obligation placed upon the state to foster and support such an institution implies that it is to be maintained wholly at the expense of the public. We do not think, however, that the use of the term 'benevolent' in describing the class to which the enumerated institutions belong was intended to confine them to the rendition of purely gratuitous services. And even if an unqualified requirement that the state should foster and support such institutions could be regarded as forbiding any charge being made to the direct beneficiaries the addition of the words 'subject to such regulations as may be prescribed by law' precludes such an interpretation here, and plainly indicates that the selection of ways and means was committed to the legislature without restriction. The provision of the constitution quoted was taken from that of Ohio, with only verbal changes." (Kaiser v. State, 80 K. 364, 366.)

The Supreme Court of the state of Oklahoma held that a statute imposing expenses of maintaining public patients in state hospitals for the insane on account of committment or residence is void for the reason that the constitution provides that they shall be supported

by the state. (Board of Commissioners of Logan County v. State, 254 P. 710). In the opinion the court said: "The Constitution, of course, does not expressly inhibit the power the Legislature has assumed to exercise,but an express inhibition is not necessary. The affirmation of a distinct policy upon any specific point in a state Constitution implies the negation of any power in the Legislature to establish a different policy. The presumption is that the positive provisions of a Constitution are mandatory, and not merely directory, and there is nothing to overcome this presumption, as to the provisions under consideration. On the contrary, it is strongly supported by the consideration that section 3, article 17, of the Constitution, provides that the counties shall provide for those inhabitants who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of the county."

The Kansas Supreme Court in the case of State v. Kansas State Highway Commission, 138 K. 913 upheld the constitutionality of chapter 98, of the Special Session Laws of 1933, which was an act permitting the state highway commission to borrow funds from the federal government for the construction and maintenance of highways. In that case the court considered article 7, section 4 of our constitution and in that connection said: "Is the act a valid exercise of the police power of the state? Or, stated more specifically, has the state, through its Legislature, power and jurisdiction to provide work for the unemployed, or otherwise care for poor and needy citizens of the state, in view of article 7, § 4, of our Constitution, which reads: "The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants, who, by reason of age, infirmity, or other misfortune, may have claims upon the smypathy and aid of society."

The provision is not self-executing. It requires legislation, and much has been enacted (see R.S. 39-301 to 39-511). There is necessarily vested in the Legislature a discretion as to what may be prescribed by law. Passing that thought, in our governmental scheme these things are fundamental: All governmental power primarily is and originally was vested in the people. Some of these governmental powers were granted to the federal government by our federal Constitution; the others remained with our people. In the formation of our

state Constitution some governmental powers were prohibited, others were limited. Except as so prohibited, or limited, all governmental power not granted to the federal government remains with the people and may be exercised by them. Normally that is exercised or initiated by legislative enactment. Our Constitution nowhere prohibits the state from making provision by legislative enactment for the care of the poor and needy. See Treadwell v. Beebe, 107 K. 31, 38, 190 P. 768, 10 A.L.R. 1359, and authorities there cited. To the extent, therefore, the bill in question attempts to or does furnish relief to the poor and needy it violates no constitutional provisions. However, what is said in the act on that subject is in the nature of a preamble, stating reasons or grounds for enacting the statute. The economic depression mentioned in section 1 of the act is not created by this section, and may not be entirely cured by the act. What is stated in the section is valuable, if at all, in aiding the court to understand the purposes, or some of the purposes, of the Legislature in passing the act. Block v. Hirsh, 256 U.S. 135, 41 S. Ct. 458, 65 L. Ed. 865, 16 A.L.R. 165; State v. Martin (Wash.) 23 P.(2d) 1. The validity of the act must be tested by its provisions. The act makes no provision for the relief of poor and needy persons except as some of them may obtain employment in the construction and maintenance of highways contemplated by the provisions of the act." It should be observed however, that the court expressly stated that the act under consideration made no provision for the relief of the poor. That statement probably limits to a considerable degree the effect of the first part of the court's statement in regard to the construction of the provisions of art. 7, sec. 4 of the state constitution.

SUMMARY OF QUESTIONS INVOLVED

1. Do the words "counties shall provide as may be prescribed by law" in section 4 of article 7 of the Kansas constitution preclude the financial assistance required of the state under the federal social security act?
2. If financial assistance is not necessary before July 1, 1937, what steps must be taken to make possible state financial participation on that date?

3. If the state may render financial assistance or grants to the counties, can it also provide methods of administration necessary for the efficient operation of the plan as required by the federal act?
4. Will the constitutional provision requiring revenue for current state purposes to be provided for at regular sessions prevent a special session from enacting tax legislation to help pay the costs of complying with the Federal Social Security Act?

PURPOSE OF THIS BRIEF

The purpose of this memorandum brief is merely to call attention to some of the constitutional questions, that may arise in connection with any Kansas plan that may be presented for cooperation with Title I of the Federal Social Security Act and does not attempt to determine the constitutionality of any plan.

Respectfully submitted,
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